United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-7220

Docket No. 77-7220

B P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CARL F. HOLLANDER

Plaintiff-Appellant

-against-

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK

Defendant-Appellee

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

(On Appeal from the United States District Court, Southern District of New York)

CARL F. HOLLANDER
for PLAINTIFF- APPELLANT
pro se

6 Northridge Rd.
Old Greenwich, Conn.
06870 (Tel. 203-637-0012)

TABLE OF CONTENTS

	PAGE
TABLE OF CASES	i - iv
GENERAL STATEMENT OF THE ISSUES AND SUMMARY OF ARGUMENT	1
THE FACTS	2
POINT I - PLAINTIFF - APPELLANT (HOLLANDER) WAS AND IS ELIGIBLE FOR, AND ENTITLED TO, THE TERMINATION ALLOWANCE OF DEFENDANT - APPELLEE, THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (MONY), BOTH ON THE BASIS OF ITS PRIOR UNIFORM PRACTICE IN GRANTING SUCH ALLOWANCE TO OTHER EMPLOYEES SIMILARLY SITUATED AS TO AGE AND LENGTH OF SERVICE, AND ON SALARY SAVINGS IT COULD REASONABLY HAVE ANTICIPATED.	9
POINT II - MONY CANOT EXERCISE ITS DISCRETION ARBITRARILY SO AS TO DEPRIVE HOLLANDER OF HIS RIGHT TO A TERMINATION ALLOWANCE UNDER A PLAN OF A TYPE REGARDED UNDER THE DECISIONS AS CONTRACTUAL IN NATURE.	11
(a) The Courts Prohibit Arbitrary Determinations	11
(b) The Courts Regard such Termination Allowance Plans as Contractual in Nature	15
(c) The Cases upon which MONY Relies do not Permit Arbitrary Action or Otherwise Indicate that an Employee Eligible under the terms of a Plan is not Entitled to Collect.	19
POINT III - ANY DENIAL OF BENEFITS TO RETIRING EMPLOYEES WHO HAD BEEN VALUED, WELL REGARDED EMPLOYEES IS ILLEGAL AND AGAINST PUBLIC POLICY	22
POINT IV - THE COURT BELOW COMMITTED REVERSIBLE ERROR IN (A) REFUSING TO ADMIT IN EVIDENCE HOLLANDER'S EXHIBIT 5 FOR IDENTIFICATION, HIS COMPILATION OF CERTAIN SALARY DATA FROM VOLUMINOUS EVIDENCE (73 SALARY RECORD CARDS) AND (B) PREJUDGING AGAINST HOLLANDER'S CASE, AS EVIDENCED BY ITS COMMENTS GIVING UNDULY CONCLUSIVE EFFECT TO MONY'S DISCRETION AND UNREASONABLY DOWNGRADING THE WEIGHT AND PERSUASIVE CHARACTER OF HOLLANDER'S SALARY RECORD EVIDENCE.	25

TABLE OF CASES

	PAGE
Allen v. Crowell-Collier Publishing Co., 21 N.Y. 2d. 403, 288 N.Y.S. 2d 449 (N.Y. Ct. of App., 1968)	16
Alt v. Long Island R. Co., 81 Misc. 2d 99, 365 N.Y.S. 2d 480 (N.Y. Sup. Ct., Nassau County, 1975)	21
Anthony v. Jersey Central Power & Light Co., 143 A. 2d 762 (N.J. Super., 1958)	14
Bailey v. Rockwell Spring & Axle Co., 175 N.Y.S. 2d 480 (N.Y. Sup. Ct., N.Y. County, 1958)	20
Bird v. Connecticut Power Co., 133 A. 2d 894 (Conn. Sup. Ct. of Errors, 1957)	13
Boeing Airplane Co. v. O'Malley 329 F. 2d 585 (8th Cir., 1964)	26
Bolta Products Division v. Director of Employment Security, 255 N.E. 2d 357 (Mass. Sup. Jud. Ct., 1970)	23
Bullock v. Sterling Drug Co., 93 F.S 571, (U.S. Dist. Ct., D.C. E.D., Pa.) affirmed on District Court's opinion, 187 F. 2d 145 (3rd Cir., 1951)	17
Cain v. Allen Equipment Co., 78 N.W. 2d 296 (Mich. Sup. Ct., 1956)	17
Canter v. Berkshire Life Ins. Co., 171 N.E. 2d 518 (Ohio Sup. Ct., 1960)	13
Chapin v. Fairchild Camera & Instrument Corp., 107 Cal. Rep. 111 (Cal. App., First Dist., Div. 2, 1973)	23
Chinn v. China National Aviation Corp., 291 P. 2d 91 (Cal. App., 1955)	16
Costa v. General Motors Corp., 81 P. 2d 906 (Cal. Sup. Ct., 1938)	12
Connell v. U.S. Steel Co., 516 F. 2d 401 (5th Cir., 1975)	13
Connor v. Phoenix Steel Co., 249 A. 2d 866 (Del. Sup. Ct., 1969)	14
Cross & Brown Co. v. Nelson, 4 A.D. 2d 501, 167 N.Y.S. 2d 573 (N.Y. App. Div., First Dept., 1957)	12
Dahl v. Brunswick Corp., 356 A. 2d 221 (Md. App., 1976)	17

TABLE OF CASES (CONTINUED)

	PAGE
Danti v. Lewis, 312 F. 2d 345 (D.C. Ct. of App., 1975)	13
Davis v. Humble Oil & Refining Co., 283 So. 2d 783 (La. App., 1973	13,19
Delaware Trust Co. v. Delaware Trust Co. (sic) (Del. Ct. of Chancery, 1966)	16
Ehrle v. Bank Bldg. & Equp. Corp., 530 S.W. 2d 482 (Mo. App., 1975)	13
Elby v. Livernois Engineering Co., 194 N.W. 2d 429 (Mich. App., 1972)	14
Ellis v. Emhart Manuf. Co., 191 A. 2d 546 (Conn. Sup. Ct. of Errors, 1963)	16
Fairchild Stratos Corp. v. Lear Siegler, Inc. 337 F. 2d 785 (4th Cir., 1964)	26
Fernekes v. C.M.P. Industries, Inc., 13 N.Y. 2d 217, 246 N.Y.S. 2d 201 (N.Y. Ct. of App., 1963)	20
Food Fair Stores v. Greely, 285 A. 2d 632 (Md. Ct. of App., 1972)	13
Gaydos v. White Motor Co., 220 N.W. 2d 697 (Mich. App., 1974)	16
Gittelson v. DuPont, 17 N.Y. 2d 46, 268 N.Y.S. 2d 11 (N.Y. Ct. of App., 1966)	12,19,24
Hadden v. Consolidated Edison Co., 34 N.Y. 2d 88 356 N.Y.S. 2d 249 (N.Y. Ct. of App., 1974)	15
Hainline v. General Motors Corp., 444 F. 2d 1250 (6th Cir., 1971	11
Hercules Powder Co. v. Brookfield, 53 S.E. 2d 804 (Sup. Ct., Va., 1949)	17
Hinkeldey v. Cities Service Oil Co., 470 S.W. 2d 494 (Mo. Sup. Ct., 1971)	14,17
Ingrassia v. Shell Oil Co., 394 F.S. 875 (D.C., S.D. N.Y., 1975)	17
Jordan v. Rousselot, 51 A.D. 2d 917, 381 N.Y.S. 2d 75 (N.Y. App. Div., First Dept., 1976)	20
Karpinski v. Ingrasci, 28 N.Y. 2d 45, 320 N.Y.S.2d 1 (N.Y. Ct. of App., 1971)	24
Krison v. Texas Industries, 253 So. 2d 614 (La. App., 1971)	17,24

BEST COPY AVAILABLE

TABLE OF CASES (CONTINUED)

	PAGE
Levitt v. Billy Penn Corp., 283 A. 2d 873 (Pa. Super. Ct., 1971)	13,14,15
Maness v. Williams, 513 F. 2d 1264 (8th Cir., 1975)	13
Matthews v. Swift & Co., 465 F. 2d 814 (5th Cir., 1972)	13
Mayhew v. New England Teamsters, 347 A. 2d 610 (N.H. Sup. Ct., 1975)	13
Meister v. C.I.R., 504 F. 2d 505 (3rd Cir., 1974)	26
Moore v. Postal Telegraph Co., 24 S.E. 2d 361 (S.C. Sup. Ct., 1943)	13
Moreschauer v. American News Co., 6 A.D. 2d 1028 178 N.Y.S. 2d 279 (N.Y. App. Div., First Dept., 1958)	17
Novack v. Bilnor Corp., 26 A.D. 2d 572, 271 N.Y.S. 2d 117 (N.Y. App. Div., Second Dept., 1966)	18
Owens v. Press Publishing Co., 120 A. 2d 442 (N.J. Sup. Ct., 1956)	23
Public Operating Corp. v. Weingart, 257 A.D. 379, 13 N.Y.S. 2d 182 (N.Y. App. Div., First Dept., 1939)	26
Regents of Univ. of Colo. v. F.D.I. Precision Products Co., 488 F. 2d 261 (10th Cir., 1973)	26
Rochester Corp. v. Rochester, 450 F. 2d 118 (4th Cir., 1971)	24
Rose v. Great Northern R. Co., 268 F. 2d 674 (8th Cir., 1959)	26
Russell v. Princeton Laboratories, Inc., 231 A 2d 800 (N.J. Sup. Ct., 1967)	13,14,16
Stanley v. Caltex Petroleum Corp., 63 Misc. 2d 780, 313 N.Y.S. 2d 836 (Sup. Ct., Queens County, 1970)	20
Stopford v. Boonton Molding Co., 265 A. 2d 657 (N.J. Super. Ct., 1970)	14
Tilbert v. Eagle Lock Co., 165 A. 205 (Conn. Sup. Ct. of Errors, 1933)	18
Twohy v. Harris, 72 S.E. 2d 329 (Va. Sup. Ct., 1952)	17

TABLE OF CASES (CONTINUED)

	PAGE
U.S. v. Kershner, 432 F. 2d 1066 (5th Cir., 1970)	26
U.S. v. Mortimer, 118 F. 2d 266 (2d Cir., 1941)	26
Weesner v. Electric Power Board, 344 S.W. 2d 766 (Tenn. App., 1961)	14
Wheeler v. Holmes Electric Protective Co., 37 A.D. 2d 858, 326 N.Y.S. 2d 49 (N.Y. App. Div., 2d Dept., 1971)	13
Willetts v. Emhart Manuf. Co., 208 A. 2d 546, (Conn. Sup. Ct. of Errors, 1965)	16,23

PRELIMINARY STATEMENT, GENERAL STATEMENT OF THE ISSUES AND SUMMARY OF ARGUMENT

This brief on this appeal is presented on behalf of Plaintiff-Appellant, Carl F. Hollander, hereinafter referred to as "Hollander." Defendant-Appellee is The Mutual Life Insurance Company of New York, hereinafter referred to as "MONY", its corporate moniker, adapted from the first letter of "Mutual of New York."

The main issue is whether MONY has the right arbitrarily to deny Hollander the same Allowance which it had granted to about 94% of other employees similarly situated during the ten year period prior to December 1, 1972, despite the fact that the circumstances of his termination clearly met the Plan's salary savings test. (Hereinafter, references will be made to the "Plan," or to the "Allowance.")

MONY claims it is entitled to prevail on two main grounds: (1) Hollander, as a valuable, well regarded employee was not eligible for the Allowance under the terms of the Plan as administered by MONY and (2) MONY, under the Plan's terms, had the sole and absolute discretion to take any action it wished, no matter how arbitrary or inequitable.

Hollander's rejoinder is: (1) he certainly was eligible, because he met the Plan's salary savings test, and (2) MONY cannot exercise its discretion arbitrarily and contrary to its prior uniform practice, as it did in this case. Moreover, he maintains that any interpretation of the Plan which would deprive him and other valued, well regarded employees of their right to collect the Allowance would be illegal and contrary to public policy. Finally, he maintains

that the Court below committed reversible error in refusing to admit in evidence his compilation summary of certain data on the salaries of other employees who received the Allowance, and in its prejudgment and prejudice against Hollander's case, by according undue conclusiveness to MONY's discretion and in unreasonably downgrading Hollander's salary evidence.

THE FACTS

MONY adopted the Plan in 1955. Although it was amended on various occasions, the essential features of the Plan, so far as they related to terminating employees whose situations were similar to Hollander's remained the same. These were to the effect that the Allowance would be granted, at MONY's discretion, whether the employee terminated "voluntarily or involuntarily", where the employee's position could be abolished, or where salary savings could be achieved within five years. (paragraphs 7 and 8 of Complaint, plaintiff's Exhibit 1, pp A-2,6-8, which will be the manner of reference to pages of Hollander's Appendix.)

Hollander, who held the title of Assistant General Counsel in MONY's Law Department, was 59½ years of age as of December 1, 1972, the effective date of his termination by retirement. He had been employed in MONY's Law Department for thirty-six years and one month. (Paragraphs 4,5 and 6 of Complaint, pp A-2,6-8).

In Tab A of its Response to Interrogatories p. A-5 hereinafter referred to as Tab A, MONY submitted data concerning actions it had taken under the Plan during the ten year period prior to December 1, 1972 (the only

period for which MONY produced data) with respect to employees who terminated after having had twenty or more years of service, and who had attained their fifty-fifth, but not their sixty-second, birthday. Of the other eighty employees in this (Hollander's) category, Tab A showed that 75 out of the 80 such employees, or 93.75 %, received the full Allowance of one year's salary.

Hollander's evidence as to the salries of such employees as were in his category consisted of 73 salary record cards, a voluminous mass of evidence in a form which was not readily comprehensible, and the offer of a compilation summary setting forth data extracted from such cards, an item of evidence he maintains is readily understandable. (Plaintiff's Exhibit 5 for Identification, p. A-87 . Although the Court below refused to admit that compilation into evidence, Hollander maintains that such refusal was clearly in error, and that, moreover, such erroneously excluded evidence may be considered upon appeal. See Point IV, infra, p.25). (Court's exlusion, p A-52).

The salary record cards, and Hollander's compilation showing the number and percentage of salary increases over the last three years of employment for himself and for the others who were in his category as to age and length of service, as described above, shows the following:

> Hollander's percentage of salary increase for the three years preceding retirement was 9.7%; for the others, it was 14.5%. Fifty-one such employees received about the same or larger percentages of increase during such three year period than did Hollander.

The average number of salary increases for such other employees during such three year period was 3.2; Hollander had two in his last three years, none in his last eighteen months.

Seven such other employees had two or more increases in their last year of service, and two had three.

Moreover, as shown by Tab A, many such other employees terminated at ages of more than sixty, so there would not have been the full five year period during which salary savings could be achieved, as there was for Hollander.

MONY's uniform practical construction of the Plan as being, in effect, an adjunct to the Early Retirment Benefits under its Security Plan is well demonstrated by the marked difference in the treatment of terminating employees under and over the age of 55, the age at which an employee becomes eligible for such Benefits under MONY's Security Plan. As shown by Tab A, only three of the twelve employees who terminated before the age of 55 were granted the Allowance, despite the fact that they had 20 or more years of service. Such a low percentage of grants for such employees (25%) is in marked contrast to the 75 out of 80 of the terminating employees who were between the ages of 55 and 62, who had 20 or more years of service, and who were awarded the Allowance (the 93.75% referred to above). Such treatment is entirely understandable when it is borne in mind how low the level of Early Retirement Benefits were at the time of Hollander's retirement. See plaintiff's Exhibit 7, p A-88 ., received A-60.

In this connection, consider the following examples as to how low such benefits were for those taking Early Retirement under the scale in effect when Hollander retired

(with assumptions as to salary, age and length of service as indicated in the headings, based on the table set forth in plaintiff's Exhibit 7, p A-88):

Average Salary Last 5 Years	Retirement Age 55	Years Served 30	Retirement Age 60	Years Served 35	Retirement Age 62	Years Served 35
$10,000		$2400		$4240		$4664
$20,000		$4800		$8480		$9328
$30,000		$7200		$10,600		$11,660

Under the circumstances, as mentioned above, it was entirely understandable that MONY had treated the Plan as being, in effect, an adjunct to its retirement Plan. Indeed, in what was obviously a recognition of the unduly low level of Early Retirement benefits, MONY, in an action which became effective as of October 1, 1973, substantially incrased the level of such benefits. Plaintiff's Exhibit 7, p A-88.

Entirely aside from the above demonstration as to Hollander's entitlement to the Allowance based upon MONY's uniform practice, the salary savings figures are equally impressive. As shown in Answer No. 8 of MONY's Response to Interrogatories and by Willard G. Eldred's testimony, lower salaried attorneys (Michael Kaplan, George Rodger, Jeanne Ray, Clifford Ferguson and John Hughes took over Hollander's work. (pp A-5, 66-69). Their composite average salary as of December 1, 1972 was $23,623, which would mean a salary saving of $9,177 per year, or a total of $45,885 to be saved over a five year period. (Answer No. 8 of MONY's Response to plaintiff's Interrogatories, p A-5).(Kaplan, who was later given the same title as Hollander's was not a replacement. He was already on MONY's legal staff when Hollander terminated.

Even if the highest paid of the five employees mentioned above were to be assumed to have taken over most of Hollander's duties, the salary saving potential over the five year

period would be equally impressive, because he, and each of the others could delegate duties downward, which is the sort of "Restructuring" approach referred to in some of the memoranda which comprise plaintiff's Exhibit G, these being memoranda in support of the grant of the Allowance to other employees in Hollander's category as to age and length of service.

Moreover, it can very reasonably be maintained that all of Hollander's salary was saved, since Willard G. Eldred testified that no replacement was hired, because all of his duties were taken over by other members of MONY's legal staff. Pp A-66-69, and A-5, Answer No. 8.

The above figures are all the more impressive when it is borne in mind that they do not take account of fringe benefits saved, which are necessarily a substantial percentage of salary.

The above salary savings figures all substantially exceed Hollander's salary amounts over the five year period. However, even substantially lower salary figures would establish Hollander's entitlement to the remainder of his Allowance, since the amount demanded in the Complaint is only about $22,000.

MONY has made no claim as to having made any salary analysis whatsoever to determine what such saving would be. This failure, in itself, should be regarded as a clear demonstration of the arbitrary nature of MONY's action in refusing to grant the Allowance to Hollander.

Hollander's claim as to the uniform grant of Allowances is related, and he maintains rightly so, to actions taken by MONY with respect to those who terminated between ages 55 and 62, and who had 20 or more years of service. It is

only by interjecting data for employees who terminated before age 55, or who had less than 20 years of service, or both, was MONY able to come up with what Hollander maintains is the distorted result, and the basis of its claim that only about 60% of terminating employees were awarded the Allowance, as represented by its Exhibit E, p A- 93 . (As explained above, age 55 is the age at which employees qualify for Early Retirement Benefits under MONY's retirement plan.)

Reliance by the Court below and by MONY on the actions it took with respect to other attorneys is unfounded for several reasons:

1. They constitute only a most insignificant percentage of the number of terminating employees in Hollander's category as to age and length of service, and neither the Court nor MONY has advanced any reason why attorneys should be treated any differently from the overwhelming majority (93.75%) of other employees in that category who were given the Allowance.

2. Richard Jenks terminated after Hollander, and Vincent Keane terminated after the Plan cutoff age of 62, as demonstrated by the fact that his name was not included in MONY's Tab A listing. However, MONY objected on two occasions to Hollander's request for certain data on two employees who were over 62 and who terminated shortly after Hollander did, on the ground that anything relating to employees over 62, or who terminated after Hollander's termination date of December 1, on the ground that no such data was of relevance to the issues raised in Hollander's action. (See Answer No. 7a of Response to Interrogatories, p A- and also pp 2, 3 and 5 of John Carley's Affidavit in Opposition to Motion to Compel Answers to Interrogatories.

3. As to Winfield Saunders and Gerhard Munch, and the only three others in Hollander's age and service category who were denied the Allowance, MONY again, on two occasions objected to any discovery of information as to what other consideration might have been granted to them on termination in lieu of the Allowance (which could, for example, have been consultant work). (See Answer 7d of Response to Interrogatories, p A-5 and pp 3-4 of the Carley Affidavit referred to in 2 above.

Admittedly, Hollander did not go all the way toward implementing his motion to compel discovery on the items thus objected to, having more or less acquiesced in MONY's vigorously expressed view that the issues in the action be considered as limited to actions taken with respect to those who terminated before December 1, 1972, and before attaining age 62. Accordingly, Hollander now respectfully submits that it would be manifestly unfair to permit MONY to change the rules of the game it had laid down by attempting to place reliance on items of evidence of a category to which it had so clearly designated as out of order.

Hollander candidly admits that he has a heavy burden to sustain in having to establish that MONY was arbitrary in its action in refusing to grant him the Allowance, and that the decision of the Court below was clearly erroneous. However, he respectfully submits that the factual evidence as to uniform practice and salary savings, as explained above, fully sustain that burden. Also, that the legal decisions cited in the following Points strongly support his position.

POINT I

HOLLANDER WAS AND IS ELIGIBLE FOR, AND ENTITLED TO , THE TERMINATION ALLOWANCE UNDER MONY'S PLAN, BOTH ON THE BASIS OF ITS PRIOR UNIFORM PRACTICE IN GRANTING SUCH ALLOWANCE TO OTHER EMPLOYEES SIMILARLY SITUATED AS TO AGE AND LENGTH OF SERVICE, AND ON SALARY SAVINGS IT COULD REASONABLY HAVE ANTICIPATED.

Hollander maintains that MONY has completely misunderstood the wording of the Plan for the granting of the Allowance, especially Subdivision (a) of Section 2, and its prior uniform practice in granting it to employees similarly situated.

It is not contested that Hollander had more than 10 years of completed service before his termination, that he had not reached the age of 62, that he did not terminate because of death, disability retirement, or layoff, and that he would be entitled to the maximum Allowance of 52 weeks of salary, all in accordance with the provisions of Section 2 of the Plan.

Hollander maintains that he is clearly entitled to such full Allowance because (1) MONY has uniformly awarded it to so many other employees, most of whom were equally valued and well regarded, in his category as to age and length of service (75 out of 80, or 93.75%) and (2)he has met the Plan's conditions as to position abolition (no replacement was hired) or salary savings, or both. (Section 2, Subdivision (a).

The fact that MONY denied the Allowance to a scattered few, for reasons never explained, and perhaps wrongfully, should not affect Hollander's entitlement on either or both of the bases referred to in the preceding paragraph.

Subdivision(a) of Section 2 of the Plan requires that either of two conditions be met as a prerequisite to entitlement to the Allowance (1) "when the employee's position can be abolished" or (2) the salary savings from the replacement at a lower salary are sufficient to recover the amount of the termination allowance within five years."

In condition number (1) the word "can" in the phrase about position abolition is the crucial one. In some of MONY's expressions in opposition to Hollander's case, the condition is recited as though it read that MONY must "intend" to abolish the position, but clearly MONY's intention is not involved. In this connection, it should be noted that Subdivision (b) of Section 2 refers specifically to the "opinion" of the Company. Thus, MONY, which prepared its own Plan, should have used different language in Subdivision (a) if it meant "intend" instead of "can".

The American College Dictionary defines "can" as to know how to, be able to; have the ability, power, right, qualifications or means to; and states "Can denotes power or ability to do something.

MONY has made no showing that it did not have the power or ability to abolish Hollander's position. The actual fact was to the contrary. MONY did in fact abolish Hollander's position as Assistant General Counsel when his retirement became effective, and, indeed, hired no replacement for him. pp A-66-69.

To prevail, MONY would have had to show, and it did not, that it did not have the power or ability to abolish Hollander's position, and that the salary savings incident to assigning his duties and responsibilities to lower salaried personnel would not permit recoupment within five years. Instead, as pointed out above in the Statement of Facts, there was more than sufficient basis for the recovery of Hollander's salary over five years.

POINT II

MONY CANNOT EXERCISE ITS DISCRETION ARBITRARILY SO AS TO DEPRIVE HOLLANDER OF HIS RIGHT TO A TERMINATION ALLOWANCE UNDER A PLAN REGARDED UNDER THE DECISIONS AS CONTRACTUAL IN NATURE.

MONY has contended, and will probably so contend on this appeal, that even if Hollander did so qualify for the Allowance, it is entitled to prevail because it declined to exercise its "sole discretion" in his favor.

This is a 19th century, simplistic, notion that what the employer giveth, the employer can take away. Fortunately,it is no longer law today. But it is worthy of note that such an argument is advanced by one of this nation's largest administrators of pension plans. It is notions such as MONY's that resulted in the enactment by Congress of a pension rights protection law, known as the Pension Reform Act of 1974.

May MONY in its "sole discretion" refuse to grant the Allowance because of the whim of one or a few individuals? To one who is over 59 years of age, and 17 years after the Plan was put into effect? Could the Allowance be refused because the employee was black? Or because of sex? Or because of an anonymous unfounded complaint? The Courts answer all these in the negative.

(a) The Courts Prohibit Arbitrary Determinations.

In Hainline v. General Motors Corp., 444 F. 2d 1250 (6th Cir., 1971), the Court rejected in vigorous langauge the contention that an employer can act arbitrarily under a bonus or severance pay plan, even when the plan contains language purporting to give the employer conclusive authority. General Motors had established a plan under which bonuses were payable only if certain conditions were met. Its Bonus and Salary Committee decided that Hainline was not entitled to a bonus on his voluntary termination. The plan gave that Committee "full power to construe, interpret and administer this plan," and that the decisions of the Committee "shall be final, conclusive and binding upon all parties." His termination had been due to his need to move his family to a warmer climate because of his daughters health and

claimed that past terminations for such reasons had not resulted in denials of bonuses.

In discussing with approval the decision of the California Supreme Court in Coats v. General Motors Corp., 81 P. 2d 906 (1938) the Court in the Hainline case, in support of its conclusion that an employer cannot act in an arbitrary fashion in administering such a plan stated (p. 1255):

> "In general, the power to exercise its discretion is not the power to act arbitrarily; discretion may not be abused by those to whom it is entrusted, and this fact holds true no less in the private than in the public sector."

The same Court later agreed with the plaintiff in that case about the undesirability of permitting the Committee the arbitrary power to render a right nugatory and thus put its decisions "beyond judicial scrutiny" and that "Totally arbitrary decisions may not be countenanced."(p.1257).

In Matter of Cross & Brown Co. v. Nelson, 4 A.D. 2d 501, 167 N.Y.S. 2d 573, where it was claimed that determination by the employer's Board of Directors arising under the terms of an employment contract was to be"final", the Court said (p. 575, N.Y.S. 2d):

> "A well recognized principal of natural justice is that a man ought not to be a judge in his own case. Irrespective of any proof of bias or prejudice, the law presumes that a party to a dispute cannot have that disinterestedness and impartiality necessary to act in a judicial or quasi-judicial capacity regarding that controversy. Any other rule would be repugnant to a proper sense of justice."

Even in Gittelson v. Dupont, 17 N.Y. 2d 46, 268 N.Y.S. 2d 11 (N.Y. Ct. of App., 1966), cited by MONY below, the New York Court of Appeals held as axiomatic that the deciding board's ruling be not arrived at by "arbitrary" action, 268 N.Y.S. 2d at page 13.

In Wheeler v. Holmes Protective Co., 37 A.D. 2d 858, 326 N.Y.S. 2d 49 (N.Y. App. Div., Second Dept., 1971), the Appellate Division stated (p. 50 N.Y.S. 2d):"the Committee may not arbitrarily and unreasonably withhold retirement approval".

In Matthews v. Swift & Co., 465 F. 2d 814 (5th Cir., 1972) the Court set aside as an arbitrary action an administrative board's decision as to the existence of an employee's disability despite provisions stating that the plan was not to"constitute any contract or create any legal or equitable right upon any employee" and that the Board's decisions"shall become final and conclusive".

Other decisions holding that an employer may not take arbitrary actions regarding provisions of benefits for employees even though plan language purports to give such power are: Connell v. U.S. Steel Co., 516 F. 2d 401, 406 (5th Cir., 1975); Danti v. Lewis, 312 F. 2d 345, 348 (U.S. Ct. of App., D.C., 1975); Maness v. Williams, 513 F. 2d 1264 (8th Cir., 1975); Bird v. Conn. Power Co., 133 A. 2d 894, 897 (Conn. Sup. Ct. of Errors, 1957); Davis v. Humble Oil and Refining Co. 283 So. 2d 783, 785 (La. App., 1973); Food Fair Stores v. Greely, 285 A. 2d 632, 636 (Md. Ct. of App., 1972); Ehrle v. Bank Bldg. and Equip. Corp., 530 S.W. 2d 482, 494 (Mo. App., 1975); Mayhew v. New England Teamsters, 347 A. 2d 610, 611, (N.H. Sup. Ct., 1975); Russell v. Princeton Laboratories, Inc., 231 A. 2d 800, 804 (N.J. Sup. Ct., 1967); Cantor v. Berkshire Life Ins. Co., 171 N.E. 2d 518, 521 (Ohio Sup. Ct., 1960); Levitt v. Billy Penn Corp., 283 A. 2d 873, 875, (Pa. Super. Ct., 1971); Moore v. Postal Telegraph Co., 24 S.E. 2d 361, 363 (S.C. Sup. Ct., 1943).

MONY has erroneously maintained that, to sustain Hollander's claim would be equivelent to holding that MONY had no discretion under the Plan. Instead, Hollander's claim is that such discretion must be exercised by MONY fairly in the light of all of the circumstances, including, in particular, a thorough exploration and consideration of the possibility of salary savings. Further, it must also consider, at least in the case of employee's in Hollander's category as to age and length of service, whether its action will be in accordance with those taken for such employees, of whatever department, over the years. Hollander maintains that the decisions cited in this brief clearly and overwhelmingly sustain his claim on the basis of such factors of consideration.

In this connection, it is axiomatic that the provisions of employee benefit plans are to be interpreted liberally in favor of employees and against the employers which prepared such plans and their language: Connor v. Phoenix Steel Co., 249 A. 2d 866, 868 (Del. Sup. Ct., 1969); Elser v. Livernois Engineering Co., 194 N.W. 2d 429, 430 (Mich. App., 1972); Hinkelley v. Cities Service Oil Co., 470 S.W. 2d 494, 500 (Mo. Sup. Ct., 1971); Russell v. Princeton Laboratories, 231 A. 2d 800, 803, supra (N.J. Sup. Ct., 1967); Stopford v. Boonton Molding Co., 265 A. 2d 657, 665 (N.J. Super. Ct., 1970); Anthony v. Jersey Central Power & Light Co., 143 A. 2d 762, 764 (N.J. Super., 1958); Levitt v. Billy Penn Corp., 283 A. 2d 873, 876, supra (Pa. Super. Ct., 1971); Weesner v. Electric Power Board, 344 S.W. 2d 766, 768 (Tenn. App., 1961)

(b) The Courts Regard such Termination Allowance Plans as Contractual in Nature.

MONY did claim below, and may still be claiming, that, because it voluntarily established the Plan, and entirely paid for it, that it is a mere gratuity, and that no legal rights could vest in Hollander. This is no longer the law (if it ever was). The Courts in the last 25 years have repeatedly stated that such benefit plans, although non-contributory by the employee, are not mere"gratuities", but are inducements or offers to an employee when he undertakes or continues employment.

Thus, in Hadden v. Consolidated Edison Co., 34 N.Y. 2d 88, 356 N.Y.S. 2d 249 (N.Y. Ct. of App., 1974), the Court said (p. 255 N.Y.S. 2d):

> "It is now recognized that a pension is not a pure gratuity, but rather a deferred portion for services rendered ****** The consideration supporting the employer's promise to pay retirement pensions is the employee's forbearance from resigning and continued work over a period of years.*****

It is significant to note that, in this statement by New York's highest Court, there is no reference to the need for any specific proof as to the employee's reliance on the Plan.

In Levitt v. Billy Penn Corp., 283 A. 2d 873, supra (Pa. Super. Ct., 1971), the Court said (p. 876):

> "Finally (employer's)interpretation of the plan is inconsistent with the idea that pension benefits are rights which the employee has earned, rather than gratuities given him by his employer. This "gratuity' theory is being discarded by our Courts, which at the same time are constricting the area within which administrative committees may exercise their total discretion."

To the same effect are the decisions in Gaydos v. White Motor Co., 220 N.W. 2d 697 (Mich. App., 1974) Delaware Trust Co. v. Delaware Trust Co. (sic), 222 A. 2d 320, 325 (Del. Ct. of Chancery, 1966); Russell v. Princeton Laboratories, 231 A. 2d 800, 803 (N.J. Sup. Ct. 1967), supra, Ellis v. Emhart Manuf. Co., 191 A. 2d 546, 549 (Conn. Sup. Ct. of Errors, 1963); Willetts v. Emhart Manuf. Co., 208 A 2d 546, (Conn. Sup. Ct. of Errors, 1965); and Chinn v. National Aviation Corp., 291 P. 2d 91 (Cal. App., 1955).

In the Chinn case, the Court, in upholding recovery of a termination allowance, said (p 92):

> "Of late years the attitude of the courts (as well as of employers in general) is to consider regulations of this type which offer additional advantages to employees as being in effect offers of a unilateral contract which offer is accepted if the employee continues in the employment, and not as being mere offers of gifts. They make the employees more content and happier in their jobs, cause the employees to forego their rights to seek other employment, assist in avoiding labor turnover, and are considered of advantage to both the employer and the employees.
>
> It has become a very general policy with large employers of labor to offer a bonus or additional compensation to employees who shall render continuous and efficient service for a specified period of time. This is not a gratuity or gift, but it is an offer on the part of the employer, with whom the offer originates in order to procure efficient and faithful service and continuous employment, and when the employee enters the service upon that inducement it becomes a supplementary contract of which he cannot be deprived without sufficient cause. (citations) Roberts v. Mays Mills, 1922, 184 N.C. 406, 114 S.E. 530, 532, 28 A.L.R. 338."

In Allen v. Crowell Collier Publishing Co., 21 N.Y. 2d 403 (N.Y. Ct. of App., 1968), the Court, in upholding the legal propriety of the Interrogatories propounded by the plaintiffs in support of their claim for severance pay, implicitly, but very clearly, endorsed the legal concept that severance or termination pay practices, even without a formal written plan, form the basis for a contract in favor of employees.

There are also many other decisions, particularly in recent years, which specifically hold that plans or practices, whether formal or informal, to make payments on termination of employment are contractual in nature: Moreschauer v. American News Co., 6 A.D. 2d 1028, 178 N.Y.S. 2d 279 (N.Y. App. Div., First Dept., 1958); Bullock v. Sterling Drug Co., 93 F.S. 371 (D.C. E.D. Pa., 1950), affirmed on District Court's opinion, 187 F. 2d 145 (3rd Cir., 1951); Ingrassia v. Shell Oil Co., 394 F.S. 875 (D.C., S.D. N.Y., 1975); Krison v. Texas Industries, 253 So. 2d 614 (La. App., 1971); Dahl v. Brunswick Corp., 356 A. 2d 221 (Md. App., 1976); Cain v. Allen Equipment Co., 78 N.W. 2d 296 (Sup. Ct., Mich., 1956); Hinkeldey v. Cities Service Oil Co., 470 S.W. 2d 494, supra (Mo. Sup. Ct., 1971); Hercules Powder Co. v. Brookfield, 53 S.E. 2d 804 (Va. Sup. Ct., 1952); Twohy v. Harris, 72 S.E. 2d 329 (Sup. Ct. Va., 1952)

In the Dahl case, the Court said at p. 224:

> "Besides these two cases, there is abundant support for the proposition that employer policy directives regarding aspects of the employment relation become contractual obligations, when with knowledge of their existence, employees start or continue work for the employer."
>
> (The Court's reference to "two cases" was to two earlier court decisions which had held Brunswick's termination allowance plan to be contractually binding; at the end of the above quotation, the Court cited many of the decisions cited above in this brief).

Finally, it should be noted that the Courts, in almost all of the many decisions cited in this Point II, are most emphatic in their language that such employee provisions, even when wholly paid for by the employer, are not mere gratuities, but are contractual in nature. They point out that even provisions reserving the right to terminate or change apply only to future provisions, and cannot adversely affect the rights of persons for whom rights have become vested by their continuing in employment with knowledge of their existence.

Of clear application here is the well settled doctrine that persons may acquire legal rights which are vested in nature, even though they previously had been subject to divestment under various circumstances. Thus, the existence of provisions purporting to give MONY unrestricted rights to terminate or alter the Plan, should not be regarded as sufficient to defeat the rights of employees who have fully performed for many years by continuing employment in reliance on the Plan.

An excellent illustration about the effect of performance as cutting off conditions is furnished by the case of Novack v. Bilnor Corp., 26 A.D. 2d 572, 271 N.Y.S. 2d 117 (N.Y. App. Div., Second Dept., 1966). In that case, plaintiff's judgment creditor brought suit to recover on the basis of a letter by defendant corporation stating that the recipient would be paid 2% of the corporation's net profits if he remained in its employment for a specified one year period. The letter also stated that the corporation's"resolution referred to is a voluntary action of the Board and is not to be deemed to create a contractual obligation." (p 118, 271 N.Y.S. 2d). The Court, in upholding recovery for Novack, then said:

> "We construe this provision to mean that the resolution created a unilateral offer and that there would be no liability until Novack's acceptance thereof by remaining in Bilnor's employ for the specified period. (See Tilbert v. Eagle Lock Co., 116 Conn. 357, 165 A. 205.) The continuation of employment affords consideration sufficient to impose liability upon Bilnor. (See Moreschauer v. American News Co., 6 A.D. 2d 1028, 178 N.Y.S. 2d 279, 1A Corbin on Contracts, Sec. 153)."

In the Tilbert case (Conn. Sup. Ct. of Errors), referred to in the above quotation, the employer's death benefit plan stated it to be voluntary and that it "constitutes no contract. Despite that provision, the Court held the plan to be a binding contract, accepted by the employee by the continuance of his employment.

(c) The Cases Cited by MONY do not Permit Arbitrary Action or Otherwise Indicate the an Employee Eligible under the Terms of a Plan is not Entitled to Collect.

MONY cited several decisions below for the propostion that the terms of the Plan govern, and that the employee must qualify under such terms to be eligible to receive its benefits. As to that proposition, MONY is correct: the terms of the Plan do govern. However, as has been demonstrated under Facts and in Point I above, Hollander has clearly qualified both on the basis of the discretionary criteria applied by MONY under its uniform practice in granting the Allowance to almost everyone in Hollander's category as to age and length of service, and on the basis of the salary savings test.

In Gittelson v. Dupont, 17 N.Y. 2d 46, 268 N.Y.S. 2d 11, supra (N.Y. Ct. of App., 1966) the plan there involved provided that employees discharged for dishonesty lost all rights. The decision was concerned only with the factual question as to whether the employee's dishonesty, which he said only involved cheating a customer of the employer, was connected with his work, within the contemplation of the plan provision in question. The Court simply held it was.

Indeed, in considering the Gittelson case, the Court in Davis v. Humble Oil and Refining Co. et al., 283 So. 2d 783 (La. App., 1973, supra specifically distinguished that case from the one before it on the ground that the determining Board in the Gittelson case had made a valid determination as to the employee's dishonesty, that the New York Court of Appeals had stated that "the facts in the record support the Board's action and that the New York Court had recognized (in the words of the Louisiana Court) that such action"must be based om sufficient evidence and must not be arbitrary or capricious." (pp 791-792).

Fernekes v. C.M.P. Industries, 13 N.Y. 2d 217, 246 N.Y.S. 2d 201 (N.Y. Ct. of App., 1963) involved a retirement and profit sharing plan which provided, as a basic requirement, five years of employment before rights could vest. Since the plaintiff in that case had been employed for less than five years at the time of his termination, and thus had not met such basic requirement, the Court held that his rights had not vested. (Three justices, including the Chief Justice, dissented.)

Stanley v. Caltex Petroleum Corp., 63 Misc. 2d 780, 313 N.Y.S. 2d 836 (N.Y. Sup. Ct., Queens County, 1970) involved an employee discharged before reaching 55 years of age, which age was the minimum provided under the plan for any entitlement to benefits, so the Court was just enforcing a basis requirement of the plan.

In Bailey v. Rockwell Spring & Axle Co., 175 N.Y.S. 2d 104 N.Y. Sup. Ct, N.Y. County, 1958), the Court similarly enforced a plan provision that no benefits were payable in the event of termination prior to the completion of ten years of service, which was the situation for the plaintiff in that case.

(The failure of the plaintiffs in the three above cases to meet the basic requirements of five and ten years of service, and age 55, is in sharp contrast to Hollander's situation, since his age and length of service were far beyond the basic requirements of MONY's Plan.)

Jordan v. Rousselot, 51 A.D. 2d 917, 381 N.Y.S. 2d 75 (N.Y. App. Div., First Dept., 1976) held that an employee's pension rights were not forfeitable upon his becoming a partner, and that the question as to the employer's claim that term life insurance benefits were all that the employee was entitled to in lieu of pension benefits was a matter which should be left for determination upon trial.

Alt v. Long Island R. Co., 81 Misc. 2d 99, 365 N.Y.S. 2d 480 (N.Y. Sup. Ct., Nassau County, 1975) held only that certain employees were not entitled to claim an increase in their benefits in connection with the employer's liberalization of its pension plan just because benefits for certain other employees had been liberalized. In other words, the decision involved merely questions as to the interpretation and application of the terms of the plan before it, and of the terms of the liberalization of that plan, all as related to the particular facts before the Court.

Accordingly, it is clear that the above decisions relied upon by MONY involved valid determinations of entirely different factual situations, or the enforcement of basic age and length of service conditions, or the interpretation or application of entirely different plan conditions. For that reason, they have no application whatsoever to the Plan involved in this action, or to the validity of the action taken by MONY thereunder with respect to Hollander.

POINT III

ANY DENIAL OF BENEFITS TO RETIRING EMPLOYEES WHO HAD BEEN VALUED, WELL REGARDED, EMPLOYEES IS ILLEGAL AND AGAINST PUBLIC POLICY.

There are no express conditions of the Plan which prohibit the grant of the Allowance to employees who had been valued, well-regarded employees. Indeed, the reference in the Plan to consideration being given to the grant whether the employee terminates "voluntarily or involuntarily" implies the contrary. Moreover, no such condition had been enforced under MONY's general and uniform practice in granting the Allowance to such a high percentage of other employees similarly situated as to age and length of service, (75 out of 80, or 93.75%, as shown under FACTS). Hollander maintains that MONY's action in denying him the Allowance is a wrongful attempt to imply such a condition.

There is no authority for MONY's position in this regard, whether at law, or under the provisions of the Plan itself. Any policy for granting the Allowance to those who were neither valued nor well regarded, while denying it to those who are violates all feelings and concepts of morality, and clearly would seem to be wrong as a matter of public policy. Such a policy, if permitted and encouraged by law, instead of promoting good service and employee loyalty (the objective of benefit plans) would tend to encourage the opposite attitudes in order for employees to qualify for benefits. Employees would conduct themselves in such a way as to give employers inducements to get rid of them.

Indeed, many recent decisions clearly support Hollander's contention that he should not be deprived of the valuable Termination Allowance benefit because of his valued performance by their holding that such a benefit is in consideration of past performance.

The leading case for the proposition that such benefits (often referred to as "separation" or "severance" pay) are in consideration for past service is Willetts v. Emhart Manuf. Corp., 208 A. 2d 546 (Conn. Sup. Ct. of Errors), supra, where the Court said (p 548):

> "*** Separation pay is not analogous to nor is a form of, unemployment insurance. Rather, it is a kind of accumulated compensation for past services and a material recognition of their past value.*** It concerns the past, not the future and once it is earned, it becomes payable no matter what thereafter may happen.

In accord with the holding of the Willetts case as to such benefits being in consideration of past service are: Chapin v. Fairchild Camera & Instrument Corp., 107 Cal. Rep. 111 (Cal. App., First Dist., Div. 2, 1973; Bolta Products Division v. Director of Division of Employment Security, 255 N.E. 2d 357, 361 (Mass. Sup. Jud. Ct.,1970) and Owens v. Press Publishing Co., 120 A. 2d 442 (N.J. Sup. Ct., 1956).

In any event, for Hollander to prevail under the above stated past performance doctrine, it is in no way necessary for him to prove that MONY or another employer could not validly provide such benefits only when, for example, it wanted to get rid of someone, even though he maintains, as stated above, that such a provision would be against public policy. Instead, as pointed out above, the essential point here is that MONY did not so provide in its Plan. Indeed, it specifically provided that the Allowance was to be considered whether the employee terminated "voluntarily or involuntarily." Therefore, the effect of the above decisions that such benefits are in consideration of past performance means that they must be granted where past performance has been good, as MONY concedes Hollander provided.

In this connection, it seems evident that the "sole discretion" provision must have been intended to enable MONY to deny the Allowance in such instances as where an employee had been guilty of dishonesty or some other misconduct. This would be instead of having a specific provision to that effect in its briefly stated Termination Allowance Plan, as MONY and many other employers have in the detailed provisions of their pension plans. Such a provision was upheld by the Courts in the Cases of Gittelson v. Dupont, 17 N.Y. 2d 46, 268 N.Y.S. 2d 11 (N.Y. Ct. of App., 1966), supra, and Krison v. Texas Industries, 253 So. 2d 614 (La. App., 1971), supra (discharge for cause). Such an interpretation of MONY's Plan clearly seems to be in accordance with its practical construction in granting the Allowance to just about everyone in Hollander's category, as pointed out above.

The Courts have the undoubted power to strike down any benefit plan provision, or employer interpretation thereof, which, as is MONY's attempted adverse interpretation as applied to Hollander's case, would have an unreasonable or arbitrary effect. This is what the Courts did in Karpinski v. Ingrasci, 28 N.Y. 2d 45, 320 N.Y.S. 2d 1 (N.Y. Ct. of App., 1971) and Rochester Corp. v. Rochester, 450 F. 2d 118 (4th Cir., 1971) and in many of the cases cited above by Hollander in Point II.

POINT IV

THE COURT BELOW COMMITTED REVERSIBLE ERROR IN (A) REFUSING TO ADMIT IN EVIDENCE HOLLANDER'S EXHIBIT 5 FOR IDENTIFICATION, HIS COMPILATION OF CERTAIN SALARY DATA TAKEN FROM VOLUMINOUS EVIDENCE (73 SALARY RECORD CARDS) AND (B) HAVING PREJUDGED THE CASE AGAINST HOLLANDER, AS EVIDENCED BY ITS COMMENTS GIVING UNDUE WEIGHT TO THE CONCLUSIVENESS OF MONY'S DISCRETION AND UNREASONABLY DOWNGRADING THE WEIGHT AND PERSUASIVE CHARACTER OF HOLLANDER'S SALARY RECORD EVIDENCE.

Hollander's Exhibit 5 for Identification was a compilation summary of figures showing the number and percentages of salary increases over the last 3 years of service for 73 employees, who, as shown by MONY's Tab A were in the same category as Hollander as to having been, at termination, between the ages of 55 and 62, and having had 20 or more years of service, and who were awarded the full Allowance. These figures were compiled from voluminous evidence consisting of the 73 salary record cards for such employees. Such a voluminous and cumbersome mass constituted an item of evidence which had little reasonable meaning or comprehensibility in the absence of some such summarization or compilation such as Hollander's Exhibit 5 for Identification represents. (p A-87).

Under such circumstances, it was clearly prejudicial error for the Court to exclude that compilation (p A-52), in view of the decisions holding that any such summary or compilation of voluminous evidence is admissable, subject only to the requirement that the other party should have the right to request an opportunity to review the summary or compilation for accuracy. Such an opportunity could easily have been arranged, particularly in this non-jury case.

The decisions referred to include Public Operating Corp. v. Weingart, 257 A.D. 379, 13 N.Y.S. 2d 182 (N.Y. App. Div., First Dept., 1939); U.S. v. Mortimer, 118 F. 2d 266 (2nd Cir., 1941); Boeing Airplane Co. v. O'Malley, 329 F. 2d 585, 599 (8th Cir., 1964); Fairchild Stratos Corp. v. Lear Siegler, Inc., 337 F. 2d 785, 794-5 (4th Cir., 1964); Regents of Univ. of Colo. v. F.D.I. Precision Products, 488 F. 2d 261, 268 (10th Cir., 1973); Meister v. C.I.R. 504 F. 2d 505, 513 (3rd Cir., 1974).

In this connection, there are also decisions holding that the appellate court, in its review, may consider evidence erroneously excluded by the trial court: Rose v. Great Northern R. Co., 268 F. 2d 674, 679 and U.S. v. Kersner, 432 F. 2d 1066, 1072 (5th Cir., 1970).

The Court's further error was in its prejudgment of, and obvious prejudice against, Hollander's case, as evidenced by its remarks. Although the Court paid lip service to the purported need for reviewing Hollander's evidence (p A-47), its remarks before doing so clearly showed such prejudgment and prejudice. These included "I could decide this case right now" MONY did not "have to give any reason" for refusing to give the Allowance and the indication that the conclusive nature of its discretion had been evidenced by its refusal to give the Allowance to a couple of other MONY attorneys. (pp A-45-46).

Additionally, such prejudgment and prejudice was evidenced by the Court's unjudicial and erroneous statements downgrading Hollander's salary record evidence. It said such increases had probably been occasioned by a union, when there had been no evidence, nor indeed even any claim, by MONY that there was a union. The other was the Court's relation of the experiences he had had as Commissioner of Licenses, a governmental post, to the salary practices of a private commercial organization. (pp A-51-52).

All of the statements referred to above clearly showed prejudical prejudgment against Hollander's evidence and his case.

CONCLUSION

Hollander respectfully maintains that he has clearly established his entitlement to the Plan's full Allowance as a matter of law, on the basis of MONY's uniform practice of granting it to such a large percentage of employees similarly situated, and on the basis of salary savings which could reasonably have been anticipated, and which, indeed, must have in fact been realized. Also, that his position is fully supported by the decisions cited in this brief.

Finally, even assuming, without conceding, that Hollander did not prove his case as a matter of law, the judgment below should be reversed because of the Court's errors in the rejection of evidence, and its prejudgment, as explained in Point IV. If the Court takes this view, then the case can be sent back for retrial, so as to give Hollander the chance to have his day in Court in accordance with properly applied judicial attitudes and procedures.

Respectfully submitted,

CARL F. HOLLANDER
For Plaintiff, pro se

2 COPYS RECEIVED

7/29/77

ROGERS & WELLS
ATTORNEYS FOR